

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**LETTERS PATENT APPEAL No. 1390 of 2005****In****SPECIAL CIVIL APPLICATION No. 9730 of 2000****With****LETTERS PATENT APPEAL No. 60 of 2006****In****SPECIAL CIVIL APPLICATION No. 4461 of 2001****For Approval and Signature:****HONOURABLE MR.JUSTICE M.S.SHAH****and****HONOURABLE MR.JUSTICE K.M.MEHTA**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
?

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VASANT KAMLESH RAMNIKLAL - Appellant(s)**Versus****GUJARAT STATE PUBLIC SERVICE COMMISSION & 6 -
Respondent(s)**

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Appearance :

PARTY-IN-PERSON for Appellant(s) : 1,
MR SK PATEL for Respondent(s) : 1,
MS MITA PANCHAL AGP for Respondent(s) : 2,
MR PARESH UPADHYAY for Respondent(s) : 3,
RULE SERVED BY DS for Respondent(s) : 4,
RULE SERVED for Respondent(s) : 5,
MR JV BHAIKAVIA for Respondent(s) : 6,
DS AFF.NOT FILED (R) for Respondent(s) : 7,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH

and

HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 31/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

Though the petitions were argued before the learned Single Judge on a wider canvass, the arguments urged on behalf of the appellants before us are in a narrow compass. The controversy in these appeals revolves around prescription of minimum qualifying marks at the viva-voce test for appointment to Gujarat Engineering Services (Class-I and Class-II), particularly whether such prescription can be made after the viva-voce test is over and after the Public Service Commission gets the details of the marks at the written test and the marks at the viva-voce test.

2. Both these appeals are directed against the common judgment dated 31.8.2005 passed by the learned Single Judge in three petitions. Since the appeals involve common questions of law, with the consent of the learned counsel for the parties as well as the appellant in LPA No.1390 of 2005, the appeals have been heard together and are being disposed of by this common judgment.

For the sake of convenience, here is the index to the judgment.

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FACTS

3.0 The petitions giving rise to these appeals were filed in the following factual background :-

3.1 By advertisement dated 1.2.1996 (Annexure-C to the original petition), the Gujarat Public Service Commission (hereinafter referred to as “the GPSC” or “the Commission”) invited applications for combined competitive examination for appointment in Gujarat Engineering Services (Class-I and Class-II) for the following posts:-

Name of the post	Total No. of posts	Reserved for		
		SC	ST	SEBC
Executive Engineer (Civil) Class-I	10	01	02	02
Dy. Executive Engineer (Civil) Class-II	11	02	03	-

3.2 Pursuant to the said advertisement, the appellants and others had applied. The appellants appeared at the competitive examination held by the Commission. Mr Vasant KR (appellant in LPA No.1390 of 2005) had applied in the open merit category. Mr Atul D Parmar (appellant in LPA No.60 of 2006) had applied in the category of Scheduled Caste candidates. The GPSC conducted written test in nine papers with 900 marks. Since the number of open merit candidates to be selected and appointed in Class-I and Class-II services was 11 (21 total less 10 reserved), the GPSC called 33 candidates for the common viva-voce test. Looking to the marks obtained by the candidates at the written test, the GPSC prescribed the following standard of qualifying marks at the written examination for the purpose of being called for the viva-voce test:-

WRITTEN EXAMINATION (TOTAL 900 MARKS)

Category	Qualifying Marks	Percentage
-----	-----	-----
General	438	48.66
SEBC	421	46.77
SC	392	43.55
ST	173	15.22

Since both the appellants herein had obtained more than the qualifying marks for their respective categories, they were called for the viva-voce test. Mr Vasant KR had obtained 458 out of 900 marks. Therefore, he was called for viva-voce for the

open merit category. Mr Atul Parmar (SC) had obtained 409 marks and, therefore, he was called for viva-voce for the Scheduled Caste category.

3.3 The common viva-voce test for Class-I Engineering Service and Class-II Engineering Service was conducted in September 1999 by the following Committee:-

- | | | |
|----|--|---------------|
| 1. | Major Dr Pundrik Raval | Chairman |
| 2. | Shri Pravinsingh Chavda | Member |
| 3. | Dr. Prabudas Patel | Member |
| 4. | Shri PC Purbiya
Chief Engineer | Govt. Nominee |
| 5. | Shri SS Rathore,
Spl. Secretary and
Chief Engineer | Advisor |

As per the Examination Rules, maximum 125 marks were allotted for the viva-voce test.

3.4 On 11.8.2000, the Commission decided to prescribe the following minimum qualifying marks at the viva-voce test/ oral interview out of maximum 125 marks

VIVA-VOCE TEST (TOTAL 125 MARKS)

Category	Qualifying Marks	Percentage
-----	-----	-----
General	35	28.0
SEBC	27	21.6
SC	27	21.6

ST

15

12.0

On 18.8.2000 the GPSC declared the results for the above competitive examination for Gujarat Engineering Services (Class-I and Class-II) and sent the Select List to the State Government on 19.8.2000. The State Government issued appointment orders in April/June 2001.

3.5 The present two appellants as well as three other candidates who had obtained sufficiently high marks in the written test and were called for the viva-voce test, but who did not secure the minimum qualifying marks at the viva-voce test filed three petitions being Special Civil Application Nos.9730 and 13249 of 2000 and 4461 of 2001 challenging the above selection and appointment mainly on the ground that the GPSC could not have prescribed the minimum qualifying marks for the viva-voce test and that the select list was required to be published on the basis of the aggregate of the marks at the written test and the marks at the viva-voce test.

3.6 The marks obtained by the candidates selected and appointed in Class-II service and the marks obtained by the other open merit candidates in the reckoning were as under:-

Sr. No.	Seat No.	Marks at Written Test	Marks at Viva-voce in Sept. 1999	Total Marks at competitive exam	Placement in Select list made by PSC stipulating on 11.8.00 MQM at Viva 35/125 (i.e. 28%) (Viva held in Sept. 1999)
A	B	C	D	E	F Service/ Sr. No. in Select list
1.	170	514	55	569	Class-I/ 1
2.	724	495	57	552	Class-I/ 2
3.	630	501	47	548	Class-I/ 3
4.	275	498	47	545	Class-I/ 4
5.	59	505	35	540	Class-I/ 5
6.	868	492	40	532	Class-II/ 1
7.	Jiginder Hariom (Or. Ptr.)	506	23	523	Not selected
8.	RK Jain (Or. Ptr.)	512	12	524	Not selected
9.	297	463	50	513*	
10.	Narendra Arora (Or. Ptr.)	497	15	512	Not selected
11.	57	465	45	510	Class-II/ 2
12.	60	471	32	503	-
13.	807	456	45	501	Class-II/ 3
14.	196	438	60	498	Class-II/ 4
15.	171	441	52	493	Class-II/ 5
16.	466 (appellant KR Vasant)	458	32	490	-
17.	224	451	35	486	Class-II/ 6
18.	392	438	46	484	

[*candidate with seat No.297 (Pandya Jayesh Dayashanker) had applied for only Class-I post. Hence not recommended by GPSC for Class-II post]

MQM = Minimum Qualifying Marks at Viva

3.7 Similarly, the marks obtained by the Scheduled Caste category candidates in the reckoning were as under:-

Sr. No.	Name	Theory	Viva-voce	Total	Service/Sr.No. in Select List
1.	Seat No.1418 (SC)	415	32	447	Class-I
2.	Atul Parmar (SC) (Petitioner-Appellant)	409	25	434	Not Selected
3.	Solanki AK (SC)	395	34	429	Class-II/ 1
4.	Chauhan Ajay (SC)	394	29	423	Class-II/ 2

The marks obtained by the Scheduled Tribe category candidate selected and appointed in Class-II services were as under:-

Sr. No.	Name/Seat No.	Theory	Viva-voce	Total	Service/ Sr.No. In Select list
1.	1489	358	35	393	Class-I/ 1
2.	1469	357	18	375	Class-I/ 2
3.	Patel RV (ST)	306	16	322	Class-II/1

None of the petitioner-appellants belongs to a Scheduled Tribe or to an SEBC category.

PROCEEDINGS BEFORE THE LEARNED SINGLE JUDGE

4.1 The gravamen of the challenge raised by the appellants and other candidates who were declared to have failed at the viva-voce test was the contention

that in **LV Ashara vs. Gujarat Public Service Commission, (1985) 2 SLJ 83**, this Court had directed the GPSC and the State Government to ignore the prescription of minimum qualifying marks at the viva-voce test for Gujarat Engineering Services (Class-I and Class-II) conducted under the same Rules and this Court had issued a mandamus directing the GPSC to prepare the select list on the basis of the aggregate of the marks at the written test and the marks at the viva-voce test. It was also contended that the Special Leave Petition against the aforesaid decision of this Court was dismissed by the Hon'ble Supreme Court. Reliance was also placed on certain decisions of the Apex Court.

4.2 Counter affidavit was filed on behalf of the GPSC contending that Rule 4 of the Examination Rules prescribing the procedure for appointment by direct selection permits the GPSC to prescribe the minimum qualifying marks at the viva-voce and personality test and that in the case of LV Ashara (supra) also this Court had held that it is left to the discretion of the Commission whether or not to prescribe the qualifying marks. It was also contended in the reply affidavit that looking to the principles laid down by the Hon'ble Supreme Court in several decisions, prescription of 35 marks out of 125 marks (28% at the viva-voce test) for the general category candidates was not arbitrary.

5.1 When the matters were pending before the learned Single Judge of this Court (Coram: Hon'ble Mr Justice YB Bhatt as His Lordship then was), while passing orders on 17.9.2002, the learned Single Judge made the following observations:-

“Another question which would arise, particularly in the facts of this case, is as to whether the qualifying marks at the viva-voce /interview were fixed by the Viva Voce Committee before conducting the interviews or after conducting the interviews. It is obvious that if qualifying standard was fixed by the Viva Voce Committee after conducting the interviews, the allegations of malafide would require to be seriously considered.

In the context of the above situation, the GPSC is directed to file an appropriate affidavit addressing these issues particularly on the facts required to be placed on record, so as to address these controversies.”

(emphasis supplied)

5.2 In compliance with the aforesaid directions, further affidavit dated 8.10.2002 came to be filed by Dy. Secretary, Gujarat Public Service Commission stating inter-alia as under:-

“In the instant case, minimum qualifying marks for viva-voce/ interview are fixed after the viva-voce is over. I repeat it once again that fixing of minimum marks for viva-voce/interview is performed by the Commission (and not the interviewing committee). I say that in view of the observation made by the Hon'ble Apex Court in case of State of UP vs. Rafiqquddin and others, as reported in AIR 1988 SC 162, the

Commission may fix the minimum qualifying marks at any stage."

(emphasis supplied)

After quoting the paragraphs from the said decision, the deponent of the affidavit further stated as under:-

"I say that as no minimum qualifying marks for viva-voce/interview in the instant case is decided either before or during viva-voce/interview, there is no possibility of malafide of the minimum qualifying marks for viva-voce/interview being used as a weapon to favour selection of 'some' candidates and/or to reject 'some' candidates, by the committee for the viva-voce/interview.

9. I say that even the facts :

(i) that none of the members conducting viva-voce/interview is aware about the written test marks of the candidates being interviewed, and,

(ii) that candidates are not called for interview in the order of their merit i.e. in order of the marks obtained by the candidates – literally renders it impossible to use the minimum qualifying marks for viva-voce/interview as a tool to select and/or reject some candidates. Hence, no question of oblique motive and/or malafide. For the sake of clarification, I say that the candidates are called for viva-voce/interview as per their seat number and category wise and even at the cost of repetition, I say that no member conducting viva-voce/interview, is aware about the written test marks of the candidates being interviewed."

The GPSC also justified the prescription of minimum qualifying marks for the viva-voce/interview, the purpose of which is to test qualities, like leadership, presence of mind, reacting to hypothetical problems, alertness, general awareness and interacting with people.

5.3 The learned Single Judge referred to Rule 4 of the Examination Rules and after considering the decision of the Division Bench of this Court in LV Ashara's case (*supra*) as well as certain decisions of the Apex Court, more particularly in *State of UP vs. Rafiquddin*, AIR 1988 SC 162 held that Rule 4 did empower the GPSC to prescribe the minimum qualifying marks for viva-voce test also and that prescription of 35 out of 125 marks (28%) was not unreasonable, more particularly considering the fact that the written test was for 900 marks and 125 marks were allotted for viva-voce i.e. 12.5% of the total marks. The learned Single Judge also negated the allegations of malafide and dismissed the petitions.

6. It is against the aforesaid judgment that two out of the six original petitioners are in appeal before us. Both the appellants were working as Assistant Executive Engineers under the State Government on the date of the viva-voce test and at present also they are working in the same capacity.

COMMISSION'S POWER TO FIX MINIMUM QUALIFYING MARKS AT VIVA-VOCE TEST.

7. Rule 4 of the Executive Engineers (Civil) Gujarat Engineering Service Class-I Recruitment Rules, 1979 (which Rules provide for common competitive examination for recruitment to Gujarat Service of Engineers Class-I and Gujarat Service of Engineers Class-II) reads as under:-

“4. The Commission will fix what should be the qualifying marks in any or all the subjects of the examination and the total either generally for all candidates or separately for candidates from the Scheduled Castes/ Scheduled Tribes, Socially and Economically Backward Class including Nomedic and Denotified Tribes in respect of vacancies reserved for such candidates and for other candidates, and a candidate shall not be deemed to have qualified in the examination, if he fails to obtain the qualifying marks fixed by the Commission in the Viva-voce and Personality Test.”

(emphasis supplied)

8. In LV Ashara's case (1985) 2 SLJ 83, a Division Bench of this Court held that though the Rule was not happily worded, it clearly empowers the Commission to prescribe the qualifying marks for written test as well as for viva-voce test. Whereas the Rule makes it obligatory on the Commission to prescribe qualifying marks for the written test, so far as viva-voce test is concerned, it is left to the discretion of the Commission whether or not to prescribe the qualifying marks. However, what

prompted the Division Bench to strike down the select list in Ashara's case was that while the minimum qualifying standard prescribed by the Commission at the written test for the purpose of being eligible for viva-voce test was 45% (447 marks out of 900 marks), the Commission prescribed 50% as the minimum qualifying marks at viva-voce test for the purpose of being considered suitable for the post. This Court held that no justification was given by the Commission for fixing such high percentage of minimum qualifying marks for the viva-voce test as compared to the lower percentage fixed for qualifying at the written test. The Court of course appreciated the importance of an oral interview or a viva-voce test, which is necessary to get a full and complete picture of the candidate, particularly when question of selection is for appointment to a post requiring certain aptitudes, personality and many other qualities, such as initiative, resourcefulness, effectiveness in discussion, adaptability and capacity for decision making. The Court held that for assessing such qualities interview was necessary. However, since the percentage of minimum qualifying marks at the viva-voce test was prescribed at 50%, this Court directed the Commission to consider the question of inclusion of the candidates' names in the merit list on the basis of aggregate of marks in the written test as well as viva-voce tests ignoring the concept of minimum qualifying marks at viva-voce test.

9.0 We now turn to the Apex Court decisions on the subject.

9.1 In **State of UP vs. Rafiquddin, AIR 1988 SC 162**, the Apex Court laid down the following principles:-

“..The Commission had therefore power to fix the norm and in the instant case it had fixed 35 per cent minimum marks for viva-voce test. The viva voce test is a well-recognised method of judging the suitability of a candidate for appointment to public services and this method had almost universally been followed in making selection for appointment to public services. Where selection is made on the basis of written as well as viva-voce test, the final result is determined on the basis of the aggregate marks. If any minimum marks either in the written test or in viva-voce test are fixed to determine the suitability of a candidate the same has to be respected. Clause (ii) of the proviso to Rule 19 clearly confers power on the Commission to fix minimum marks for viva-voce test for judging the suitability of a candidate for the service. We do not find any constitutional legal infirmity in the provision.”

(emphasis supplied)

9.2 In Manjeet Singh vs. Employees State Insurance Corporation, (1990) 2 SCC 367 the Apex Court held that even prescription of 40% as qualifying marks for the interview test would be reasonable.

9.3 Very recently in KH Siraj vs. High Court of

Kerala, 2006 AIR SCW 3136 = **2006 (6) SCC 395**, Rule 7(1) of the Kerala Judicial Services Rules, 1991 read as under:-

“7. Preparation of lists of approved candidates and reservation of appointments. - (1) The High Court of Kerala shall, from time to time, hold examinations, written and oral, after notifying the probable number of vacancies likely to be filled up and prepare a list of candidates considered suitable for appointment to Category 2. The list shall be prepared after following such procedure as the High Court deems fit”

The competitive examination for appointment to the posts of Munsif Magistrate comprised of written test of 400 marks and oral examination of 50 marks. The Kerala High Court issued advertisement (notification) dated 26.3.2001 inviting applications specifically mentioning in para 10(3) that the qualifying marks would be as under:-

Written examination	At least 35 per cent marks in each paper with an overall minimum of 45 per cent of the total marks for the written examination (for SC/ST candidates 30 percent with an overall minimum of 35 percent)
Oral examination	30 percent of the marks for the oral examination

The appellants before the Apex Court were not selected as they had not secured the prescribed minimum marks at the oral examination. The appellants challenged the said selection. They contended that in the absence of specific legislative mandate under Rule 7(1) of the Rules prescribing cut-off marks in oral examination, the fixing of separate minimum cut-off marks in the interview for further elimination of candidates after a comprehensive written test touching the required subjects in detail, was violative of the statute.

After considering all the previous decisions on the subject, the Apex Court has held as under:-

- (i) What the High Court has done by the notification dated 26.3.2001 is to evolve a procedure to choose the best available talent. It cannot for a moment be said that prescription of minimum pass marks for the written examination or for the oral examination is in any manner irrelevant or not having any nexus to the object sought to be achieved.
- (ii) The interview is the best mode of assessing the suitability of a candidate for a particular position. While the written examination will testify the candidate's

academic knowledge, the oral test alone can bring out or disclose his overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership etc.

(iii) Acceptance of the contention of the appellant- petitioners can even lead to a postulate that a candidate who scores high in the written examination but is totally inadequate for the job as evident from the oral interview and gets zero marks may still find a place in the judiciary. It is, therefore, that the High Court has set a benchmark for the oral interview, a benchmark which is actually low as it requires 30% for a pass. The total marks for the interview are only 50 out of a total of 450. The prescription is, therefore, kept to the bare minimum and if a candidate fails to secure even this bare minimum, it cannot be postulated that he is suitable for the job of Munsif Magistrate, as assessed by five experienced Judges of the High Court.

(iv) The very scheme and amplitude of Rule 7 under which the selection is made is sufficient answer to the contention of the appellants. The candidate to be selected must be found suitable for the post of a

judicial officer.

- (v) "Apart from the amplitude of the power under Rule 7, it is clearly open to the High Court to prescribe benchmarks for the written test and oral test in order to achieve the purpose of getting the best available talent. There is nothing in the Rules barring such a procedure from being adopted. It may also be mentioned that executive instructions can always supplement the Rules which may not deal with every aspect of a matter. Even assuming that Rule 7 did not prescribe any particular minimum, it was open to the High Court to supplement the rule with a view to implement them by prescribing relevant standards in the advertisement for selection."

(emphasis supplied)

FOCUS OF CONTROVERSY

10. In the present case, in view of the aforesaid provisions of Rule 4 of the Examination Rules, the aforesaid principles laid down by this Court in LV Ashara's case (supra) and also the principles laid down by the Apex Court in the aforesaid decisions, the appellants before us were not in a position to seriously press their challenge to power of the Commission to prescribe the minimum qualifying marks, but submitted that -

- (i) the post of Dy. Executive Engineer is more or less a technical post and, therefore, prescription of 35 out of 125 marks as the minimum qualifying marks for the viva-voce test was excessive and unreasonable.
- (ii) in any view of the matter, the Commission also acted arbitrarily and unreasonably in not prescribing the minimum qualifying marks for the viva-voce test before the viva-voce test and in prescribing such minimum qualifying marks after the viva-voce test was over and the results of both the written as well as the viva-voce test were available with the Commission.

10.1 Apart from placing reliance on the observations made by the learned Single Judge in the order dated 17.9.2002 which are already quoted in para 5.1 hereinabove, the appellants stated and submitted that no minimum qualifying standard was prescribed at the viva-voce test for fifteen years after the decision was rendered in LV Ashara's case in the year 1984/1985; that if the minimum qualifying marks at the viva-voce test were prescribed by the Commission before the interviews commenced, the Interview Committee would have been in a position to decide whether a particular candidate was or was not fit enough to be included in the select list. Ultimately, inclusion of a candidate in the select

list on the basis of the aggregate of the marks at the written test and the oral interview may be determined later on, but at least a candidate whose performance at the viva-voce test was average or not poor, would not have been left out of the competition even after securing very high marks at the written test merely on the ground that the candidate secured 32 and not 35 marks at the viva-voce test, when the Interview Committee itself was not apprised in advance about the impact of marks it was going to give the candidate for performance at the viva-voce test.

11. On the other hand, Mr SK Patel, learned counsel for the GPSC with Ms Mita Panchal, learned AGP for the State Government and Mr Paresh Upadhyay for the selected candidates have submitted that the Apex Court has already held in *State of UP vs. Rafiquddin*, AIR 1988 SC 162 that while it may be necessary for the examining body, like the Universities to prescribe minimum qualifying marks in advance, the considerations in the matter of prescribing minimum qualifying marks for competitive examination are quite different. It is further submitted that prescription of minimum qualifying marks at the viva-voce test would be fraught with the risk of Interview Committee giving 34 marks or 36 marks with the sole purpose of excluding or including a candidate's name in select list and that while passing a candidate at the viva-voce test may not guarantee his inclusion in the select list,

consciously failing a candidate at the viva-voce test/interview by awarding him less than the minimum qualifying marks would certainly eliminate a candidate from the competitive examination. The learned counsel for the respondents, therefore, submitted that prescription of minimum qualifying marks at the viva-voce test after the viva-voce test is over is more conducive to a transparent selection process.

DISCUSSION

Contention (i)

12. Having heard the learned counsel for the parties, it appears to us that in view of the language of Rule 4 of the Examination Rules, there is no manner of doubt that the Commission did have the power to prescribe the minimum qualifying marks for the written test as well as for the viva-voce test. While the object of conferring such power on the Commission for prescribing the minimum qualifying marks at the written test is to ensure that the number of candidates to be called for the viva-voce test is not unduly large and that the Interview Committee is able to invest sufficient time and energy to conduct interviews of each of the candidates who are found to be sufficiently meritorious at the written test, equally valid is the purpose of the viva-voce test - that is to test the personality of the candidate in order to ascertain his suitability or otherwise for a public post which

would involve all such qualities, like leadership, presence of mind, reacting to hypothetical problems, alertness, general awareness and interacting with people.

13. The appellants have, however, submitted that the post of Dy. Executive Engineer is more or less a technical post and, therefore, prescription of 35 out of 125 marks as the minimum qualifying marks for the viva-voce test was excessive and unreasonable. It is not possible to accept this contention because what should be the minimum qualifying marks at the viva-voce test is not a matter to be decided by the Court. It is purely a policy decision to be embodied in the Rules to be prescribed by the Selection Committee. In *State of UP vs. Rafiquddin*, 1987 Supp. SCC 401 = ARI 1988 SC 162, the Apex Court has laid down the following principles :-

"in the case of such services where sound selection must combine academic ability with personality promise, some weight has to be given, though not much too great weight, to the interview test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service to service according to the recruitment of the service, the minimum qualifications prescribed, the age group from which the selection to be made, the body to which the task of holding the interview test is proposed to be entrusted and host of other factors. It is a matter of determination by experts. It is a matter of research. It is not for courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives."

(emphasis supplied)

While in *State of UP vs. Rafiquddin*, AIR 1988 SC 162, prescription of 35 percent marks at the viva-voce test was upheld, in *Manjeet Singh vs. ESIC*, (1990) 2 SCC 367, prescription of even 40 percent as the minimum qualifying standard at the viva-voce test was considered reasonable. In *KH Siraj vs. High Court of Kerala* decided as recently as in May 2006, prescription of 30 percent as the minimum qualifying marks at the oral examination has been upheld.

14. Reliance placed by the appellants on the observations made in *LV Ashara's case* (supra) is misconceived. What weighed with the Division Bench in *LV Ashara's case* was prescription of 50% qualifying marks at the viva-voce test as against the prescription of 45% marks as the minimum qualifying marks at the written test. Considering that 35 out of 125 marks works out to only 28 per cent of the marks for viva-voce test (and 27 marks out of 125 for Scheduled Caste candidates works out to only 22 percent), such percentage cannot be said to be excessive or unreasonable, particularly when the minimum qualifying standard at the written test was 48.66 percent for open merit candidates and 43.55 percent for Scheduled Caste candidates. Hence, this contention must fail.

CONTENTION (ii) – the MAJOR CONTENTION

15. However, the alternative submission urged on behalf of the appellants that prescription of the minimum qualifying marks after the viva-voce test was over was irrational and arbitrary and violative of Article 14 of the Constitution does merit serious consideration.

16. We have been shown the marks awarded to all the candidates who appeared at the viva-voce test.

16.1 Some of the candidates had secured very high marks at the written test i.e. 506, 512 and 497 out of 900 marks at the written test, but they were awarded only 23, 12 and 15 marks respectively at the viva-voce test. While those candidates were nowhere near the subsequently stipulated minimum qualifying marks for the viva-voce test i.e. 35 marks, there were two candidates : Seat No.60 and appellant – Mr Vasant KR with Seat No.466 who were awarded 32 marks each at the viva-voce test (only marginally less than 35 marks **SUBSEQUENTLY** prescribed as the minimum qualifying standard) after they secured 471 and 458 marks respectively at the written test. Their case is required to be compared with that of the candidate placed at Sr. No.6 in the select list for Class-II services in open merit category Mr Samir Raval whose marks were as under :-

Name	Theory	Viva-voce	Total	Sr.No. In Select List
Seat No.60	471	32	503	Not included
KR Vasant (Appellant)	458	32	490	Not included
Raval Samir	451	35	486	6

16.2 Similarly, appellant, Mr Atul Parmar belonging to a Scheduled Caste had secured more marks at the written test as well as aggregate of the marks for written test and viva-voce test than both the candidates placed in the Class-II services select list for Scheduled Castes. 25 marks awarded to him at the viva-voce test was only marginally less than the **SUBSEQUENTLY** prescribed minimum qualifying standard of 27, which will be clear from the following table :-

Sr. No.	Name	Theory marks	Viva-voce marks	Total	Sr.No. In Class-II services Select List for SC
A	B	C	D	E	F
1	Atul Parmar(SC) (Appellant)	409	25	434	Not included
2	Solanki AK (SC)	395	34	429	1
3	Chauhan Ajay (SC)	394	29	423	2

17. In the background of the undisputed fact that for the last 15 years before the interviews were

conducted in September 1999, no minimum qualifying standard was prescribed for the viva-voce test, it was surprising that the Interview Committee was not informed in advance about the minimum qualifying standard for the viva-voce test for any of the categories. The Interview Committee could not be expected to know that a candidate getting 32 marks at the viva-voce test would be SUBSEQUENTLY eliminated out of the competitive examination while a candidate with 35 marks would be included in the open merit category; that a candidate with 27 marks would be included in the Scheduled Caste category but a candidate with 25 marks would be eliminated, but a Scheduled Tribe candidate with 15 marks would be included in the Select list. We are of the view that if the Interview Committee had been informed in advance about such a minimum qualifying standard before the commencement of the interviews, the Interview Committee would have been in a position to judge the suitability or otherwise of a candidate for inclusion in the select list. Even after making concessions for the ST candidates, the Committee might as well have been surprised to know that the candidates in the open merit category to whom they had awarded 32 marks at the viva-voce test, and the candidates to whom they had awarded 25 marks in the Scheduled Caste category were subsequently declared to have been failed at the viva-voce test as against the candidate in the Scheduled Tribe category, to whom it had awarded only 16 out of 125 marks for the viva-voce test, was declared to have passed at the

viva-voce test.

18. The defence of the GPSC in this behalf is two fold: -

In the first place, in para 8 of the additional affidavit dated 8.10.2002, the GPSC has contended as under:-

"I say that as no minimum qualifying marks for viva-voce /interview in the instant case is decided either before or during viva-voce/interview, there is no possibility of malafide of the minimum qualifying marks for viva-voce/interview being used as a weapon to favour selection of 'some' candidates and/or to reject 'some' candidates, by the committee for the viva-voce/interview."

To say the least, this stand not only amounts to GPSC casting aspersions on its own Interview Committee, but it also ill-comes from the mouth of a constitutional authority, like the State Public Service Commission. We fail to appreciate as to how prescription of the minimum qualifying marks at the viva-voce test before or at the commencement of the viva-voce test would be less conducive to a transparent selection process.

19. On the contrary, a glance at the following charts will show that by making expost-facto provision of a cut-off marks after the viva-voce test was over, the GPSC expost-facto assumed to itself the power of bringing into, or eliminating particular candidates out of, the select list.

19.1

Sr. No.	Seat No.	Marks at Written Test	Marks at Viva-voce in Sept. 1999	Total Marks at competitive exam	Placement in Select list made by PSC stipulating on 11.8.00 MQM at VIVA 35/125 (i.e. 28%) (VIVA held in Sept. 1999)	If MQM at VIVA were stipulated at 32/125 (i.e. 25.60%)
A	B	C	D	E	F Service/ Sr. No. in Select list	G Service/ Sr. No. in Select list
1.	170	514	55	569	Class-I/ 1	Class-I/ 1
2.	724	495	57	552	Class-I/ 2	Class-I/ 2
3.	630	501	47	548	Class-I/ 3	Class-I/ 3
4.	275	498	47	545	Class-I/ 4	Class-I/ 4
5.	59	505	35	540	Class-I/ 5	Class-I/ 5
6.	868	492	40	532	Class-II/ 1	Class-II/ 1
7.	Jiginder Hariom (Or. Ptr.)	506	23	523	Not selected	
8.	RK Jain (Or.Ptr.)	512	12	524	Not selected	
9.	297	463	50	513*		
10.	Narendra Arora (Or. Ptr.)	497	15	512	Not selected	
11.	57	465	45	510	Class-II/ 2	Class-II/ 2
12.	60	471	32	503	Not selected	Class-II/ 3
13.	807	456	45	501	Class-II/ 3	Class-II/ 4
14.	196	438	60	498	Class-II/ 4	Class-II/ 5
15.	171	441	52	493	Class-II/ 5	Class-II/ 6
16.	466	458	32	490	Not selected	
17.	224	451	35	486	Class-II/ 6	
18.	392	438	46	484		

[*candidate with seat No.297 (Pandya Jayesh Dayashanker) had applied for only Class-I post. Hence not recommended by GPSC for Class-II post]

By stipulating 35 out of 125 as the cut-off marks, the GPSC included the candidate at Sr. No.5 of the chart in the Select list for Class-I and candidate at Sr.No.17 in the Select list for Class-II. On the other hand, if cut-off marks at the viva-voce test had been fixed at 40 out of 125, those two candidates would have been eliminated, and candidate at Sr. No.18 of the chart would have got into the Select list for Class-II.

19.2 Similarly in the Scheduled Caste category also, by expost-facto stipulation of cut-off marks in the viva-voce at 27 marks, the GPSC eliminated appellant- Atul Parmar and included Chauhan Ajay.

Sr. No.	Name	Theory marks	Viva-voce marks	Total	Sr.No. In Class-II services Select List for SC	Sr. No. in Class-II list if cut-off marks at viva-voce 25
A	B	C	D	E	F	G
1	Atul Parmar(SC) (Appellant)	409	25	434	Not included	1
2	Solanki AK (SC)	395	34	429	1	2
3	Chauhan Ajay(SC)	394	29	423	2	Would not be included

20. Secondly, the learned counsel for the GPSC has heavily relied on the following observations made by the Apex Court in State of UP vs. Rafiquddin, AIR 1988 SC 162 in support of the submission that

cut-off marks can be stipulated after the test is over :-

“there is a basic difference between an examination held by a college or university or examining body to award degree to candidates appearing at the examination and a competitive examination. The examining body or the authority prescribes minimum pass marks. If a person obtains the minimum marks as prescribed by the authority he is declared successful and placed in the respective grade according to the number of marks obtained by him. In such a case it would be obligatory on the examining authority to prescribe marks for passing the examination as well as for securing different grades well in advance. A competitive examination on the other hand is of different character. The purpose and object of the competitive examination is to select most suitable candidates for appointment to public services. A person may obtain sufficiently high marks and yet he may not be selected on account of the limited number of posts and availability of persons of higher quality. Having regard to the nature and characteristics of a competitive examination it is not possible nor necessary to give notice to the candidates about the minimum marks which the Commission may determine for purposes of eliminating the unsuitable candidates. The rule of natural justice does not apply to a

competitive examination.”

(emphasis supplied by respondents)

21. While this Court does not propose to say for a moment that it was necessary to give notice to the candidates about the minimum marks which the Commission may determine for the purpose of eliminating unsuitable candidates, the observations made by the Apex Court in *State of UP vs. Rafiquddin* (supra) need to be appreciated in the proper perspective. In the first place, the prescription of minimum qualifying marks at the written test for the purpose of deciding the number of candidates to be called for viva-voce test can be made only after the results of the written test are made available to the PSC. That minimum qualifying standard cannot ordinarily be prescribed in advance, but there is no reason why the minimum qualifying standard for passing the viva-voce test cannot be declared in advance before the commencement of the viva-voce test and why should it await the conclusion of the viva-voce test and why should the minimum qualifying standard be prescribed after preparation of the merit list by aggregating the marks at the written test and the marks at the viva-voce test.

22. Moreover, the above quoted observations in *Rafiquddin's* case (supra) were made in the context of the following factual and legal background :-

By virtue of Notification issued in 1970 by the U.P. Public Service Commission a competitive examination was held for recruitment of Munsifs in the U.P. Judicial Service. A list of candidates passing in written and viva voce tests was sent to government and they were appointed as Munsifs. As more seats were vacant the Government requested the Commission to lower down the minimum prescribed marks in viva voce from 40% to 35% and accordingly the second list of candidates recommended by the Commission was sent to Government and the candidates in that list were also appointed as Munsifs. In the meanwhile, another Notification for selection of Munsifs was issued in 1972. The relevant Rules were amended and the requirement of prescribing minimum marks in viva voce was dispensed with. The successful candidates in the competitive examination held in pursuance of the 1972 Notification were appointed as Munsifs. As the Government needed more candidates a decision was taken at the high level committee to appoint candidates of 1970 who were "unsuccessful" in viva voce (third list). This decision was taken in view of the fact that in 1972 the requirement of obtaining minimum prescribed marks in viva voce was dispensed with. Accordingly the Commission forwarded a list of such "unplaced candidates" to the Government and they were also appointed as Munsifs.

The Munsifs appointed as per the third list (1970) of "unplaced candidates" were shown junior to the Munsifs appointed as per the 1972 list in the seniority list prepared by the Government. The candidates belonging to the third list (1970) claimed that they should be shown senior to the candidates selected as per 1972 list.

The Apex Court held that in view of the relevant rules the appointment of "unplaced candidates" of the competitive examination of 1970 by

including their name in the third list was illegal as it was made in violation of the provisions of the statutory rules. The Apex Court held that those appointed irregularly (third list) belonged to a different stream and they could not claim seniority vis-a-vis those who were regularly and properly appointed. Therefore, the Court held that the unplaced candidates of 1970 examination had to be assigned seniority below the last candidate of 1972 examination appointed to the service.

23. We would also like to quote the following observations made by the Apex Court in the same case of State of UP vs. Rafiquddin, AIR 1988 SC 162 :-

"We were distressed to find that the Public Service Commission has been changing the norms fixed by it for considering the suitability of candidates at the behest of the State Government after the declaration of results. We have noticed that while making selection for appointment to the U.P. Judicial Service the Commission had INITIALLY fixed 40 per cent aggregate marks and minimum 35 per cent marks for viva voce test and on that basis it had recommended list of 46 candidates only. Later on at the instance of the State Government it reduced the standard of 40 per cent marks in aggregate to 35 per cent and on that basis it forwarded a list of 33 candidates to the Government for appointment to the service. Again at the behest of the State Government and with a view to implement the decision of the high level committee consisting of Chief Justice, Chief Minister and the Chairman of the Commission forwarded names of 37 candidates in 1974 ignoring the norms fixed by it for judging the suitability of candidates. The Commission is an

independent expert body. It has to act in an independent manner in making the selection on the prescribed norms. It may consult the State Government and the High Court in prescribing the norms for judging the suitability of candidates if no norms are prescribed in the Rules. Once the Commission determines the norms and makes selection on the conclusion of the competitive examination and submits list of the suitable candidates to the Government it should not reopen the selection by lowering down the norms at the instance of the Government. If the practice of revising the result of competitive examination by changing norms is followed there will be confusion and the people will lose faith in the institution of Public Service Commission and the authenticity of selection. We are of opinion that the Commission should take firm stand in these matters in making the selection in accordance with the norms fixed by law or fixed by it in accordance with law uninfluenced by the directions of the State Government unsupported by the Rules."

(emphasis supplied)

23.1 A perusal of the aforesaid observations would indicate that the Public Service Commission is expected to prescribe the norms for judging the suitability of candidates. If no norms are prescribed in the rules and once the Commission determines the norms and (then) makes selection on the conclusion of the competitive examination and submits list of the suitable candidates to the Government, it should not reopen the selection by lowering down the norms. The decision, therefore, presupposes that the norms must be laid down in advance and not after the viva-voce test is conducted. We fail to see how the observations made in Rafiquddin's case justify the

Commission's decision to prescribe the minimum qualifying standard at the viva-voce test after the test was over.

24. In KH Siraj vs. High Court of Kerala recently decided in May 2006 also, the minimum qualifying marks in the viva-voce test were determined in advance and indicated in the advertisement itself. We are, therefore, of the view that the action of the GPSC in stipulating cut-off marks at the viva-voce test after holding the viva-voce test and after aggregating the marks for the written test and marks for the viva-voce test fails to pass the test of rationality and is violative of the appellants' fundamental rights under Article 14 and 16 of the Constitution.

MOULDING THE RELIEFS

25. Even so, this Court is not inclined to interfere with the selection and appointment of the candidates already placed in the select list as all of them had obtained the minimum qualifying marks or more at the viva-voce test and they have already completed five years of service after appointment. Since we are not disturbing the selection and appointment of the candidates already made in the year 2000-2001, and since no subsequent competitive examination for Gujarat Engineering Services (Class-I and Class-II) has been held till today, we are of the view that the GPSC through its Interview Committee

should be required to conduct the viva-voce test of the candidates in borderline cases again i.e. those who had obtained marginally less than the minimum qualifying marks at the viva-voce test. We are of the view that in borderline cases i.e. the candidates who had obtained at least 90% of the marks **SUBSEQUENTLY** prescribed as the minimum qualifying marks at the viva-voce test need to be given another opportunity to appear at the viva-voce test. This would mean -

Category	Minimum qualifying marks SUBSEQUENTLY prescribed by GPSC for viva-voce of 125 marks	90% of those minimum qualifying marks at viva-voce	Those who obtained marginally less than the minimum qualifying marks at viva-voce (i.e. Borderline cases)
Open Merit	35	31.5	Seat No.60 471+32=503 Vasant KR 458+32=490 (appellant)
SEBC	27	24.3	No borderline case
Scheduled Caste	27	24.3	Atul Parmar 409+25=434 (appellant)
Scheduled Tribe	15	13.5	No borderline case

25.1 Out of the candidates who were interviewed, we find that there were only two candidates in the open merit category who were awarded more than 30 marks at the viva-voce test, but less than the subsequently prescribed minimum qualifying standard of 35 marks i.e. the candidate with Seat No.60 (471 marks at the written test) and Mr Vasant KR (appellant) with Seat No.466 (458 marks at the written test) who were both awarded 32 marks at viva-

voce. Both the above borderline candidates had obtained more aggregate marks (503 and 490) than 486 aggregate marks obtained by the last candidate in the select list for Class II Engineering Services (Dy. Executive Engineer). The other open merit candidates like the original petitioners who secured 12, 15 and 23 out of 125 marks can not be considered as borderline cases (Paras 16.1 and 19.1).

25.2 Similarly, in the reserved categories also, we find that appellant, Mr Atul Parmar (Scheduled Caste) was awarded 25 marks as against the minimum qualifying standard of 27 marks determined after the interviews and his is also the only borderline case where an SC candidate secured more than 20 marks but less than 27 marks at the viva-voce test (Paras 16.2 and 19.2).

25.3 We do not find any other borderline case in the other two categories of SEBC and Scheduled Tribes. When the minimum qualifying standard at the viva-voce test for ST candidates fixed at 15 out of 125 marks (i.e. 12%) is even otherwise so low, we will not direct the GPSC to reconsider the case of an ST candidate with 12 or 10 marks at viva-voce.

26. In view of the above discussion, the appeals are partly allowed. While rejecting the contentions urged on behalf of the appellants regarding the power of the Commission to prescribe the minimum qualifying standard at the viva-voce test and even while

upholding the stand of the Commission that prescription of 35 out of 125 marks as the minimum qualifying standard for the viva-voce test for the open merit candidates and prescription of 27 out of 125 marks as the minimum qualifying standard for the viva-voce test for the Scheduled Caste candidates was not excessive or unreasonable, for the reasons already indicated hereinabove, we direct the Commission to hold again the viva-voce test in the three borderline cases - the two open merit candidates - Seat No.60 (who had secured 471 marks at the written test and 32 marks at the viva-voce test), and appellant- Mr Vasant KR (open merit), and Scheduled Caste candidate Mr Atul Parmar for the posts of Dy. Executive Engineer Class-II within two months from the date of receipt of writ of this Court or a certified copy of this judgment, whichever is earlier.

All that the Interview Committee will be required to consider at such viva-voce test would be to assess the suitability or otherwise of the above-named candidates for appointment to the posts of Deputy Executive Engineer Class-II. It would not be necessary for the Committee to assign any specific marks to the said candidates once they are found suitable at the viva-voce test because they had already obtained more aggregate marks than the last candidate in the select list for the post of Deputy Executive Engineer Class-II for the respective categories (as indicated in Paras 16 and 19

hereinabove).

Those of the above-named three persons who are found to be suitable at the viva-voce test will be given appointment on the posts of Dy. Executive Engineer Class-II on the three vacancies which may be now available. However, such appointment will take effect from the date of appointment and they will not get any claim of seniority or pay fixation or increments for the intervening period.

It is clarified that these directions do not require the Government to create any supernumerary post.

27. A copy of this judgment shall be circulated to each member of the Interview Committee at least a week in advance to enable them to appreciate the rationale of the directions given in this judgment.

28. The appeals are accordingly partly allowed to the aforesaid extent in the aforesaid terms.

(M.S. SHAH, J.)

(K.M. MEHTA, J.)

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